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SUPREME COURT, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 274

ST. MAURICE, HELMKAMP AND MUSSER,
a California Partnership,
Petitioner;

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the District of Columbia Circuit.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit.

Petitioner, St. Maurice, Helmkamp and Musser prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 8, 1959, affirming an order of the National Labor Relations Board against Petitioner.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed as Appendix "A" hereto, is officially reported in ..... App. D.C. ....., and ..... F.2d ....., and is unofficially reported in 44 LRRM 2078, and 37 CCH Labor Cases paragraph 65,433. The case number in the Court of Appeals is No. 14,466.

The opinion of the National Labor Relations Board is officially reported at 119 NLRB 1026, and unofficially reported in 41 LRRM 1209.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 8, 1959, and its decree was entered on June 1, 1959. The jurisdiction of this Court to review the instant case is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Although there is but a single issue in this case, it raises numerous questions. The issue is the legality under the Taft-Hartley Act, 29 USC 151 ff, of a "subcontractor" clause in a collective bargaining agreement, either by itself or in conjunction with a "union security" clause in the same agreement.

In view of the many violations of the Act alleged, the different sections and subsections involved, and the difficulty of stating fully in a few words the numerous legal questions presented for review, they are set forth in detail

below, following a preliminary discussion, beginning at page 7.

All of the questions revolve about this basic one: *May a labor organization and employer lawfully agree in advance to exclude from probable employment an identifiable group of prospective employees because they are not members of, or represented by, said labor organization?*

Such is the intent and effect of the "subcontractor" clause and the "union security" clause in the collective bargaining agreement in issue herein between Northern and Central California Chapters of AGC and Operating Engineers Union Local No. 3.

This is not a mere academic matter. The record in this case shows that about 90 per cent of all the heavy, highway, engineering and building construction work in two-thirds of the State of California is involved; that the nature of the industry is such that a very substantial part of the actual work is done through the system of subcontracting; and that approximately sixty-six per cent of the professional engineering and field survey work, such as that performed by the Petitioner herein, is subcontracted to specialty contractors by the general or prime contractor.

The record also establishes that *but for* the "subcontractor" clause the petitioner herein would have performed over $100,000.00 worth of field engineering work during the period from 1952 to 1955 for one AGC contractor alone. Multiply this by the fact that the Petitioner is but one out of twenty-four firms in the Western Asso-

ciation, that there are numerous other firms doing such work, that there are over 385 "regular" AGC members, and it is readily apparent that the economic impact of the contract challenged herein effectively deprives a multitude of employees of very substantial employment opportunities *for no reason other than that they have chosen one labor organization rather than another.*

For the purpose of simplification, the contract provisions, which are set forth in full below,[1] may be described as follows:

Whenever A, the employer party to the agreement, subcontracts work to employer B, an employer not a party to the agreement, B must apply to his employees all the terms and conditions of employment agreed to between

---

[1] "Section 3—Employment and Discharge.

"(a) Hiring.

* * * * *

"All employees covered by this Agreement shall be required, as a condition of employment, to apply for and become members of, and to maintain membership in, the Union within thirty-one (31) days following the beginning of their employment or the effective date of this clause, whichever is later. This clause shall be effective on June 15, 1955, and shall be enforceable to the extent permitted by law."

* * * * *

"Section 12—Application to Sub-Contractors

"The terms and conditions of this Agreement insofar as it affects Employer and the individual employer shall apply equally to any sub-contractor under the control of, or working under contract with such employer on any work covered by this Agreement, and said sub-contractor with respect to such work shall be considered the same as an individual employer covered hereby.

"That if an individual employer shall sub-contract work as herein defined, provision shall be made in such sub-contract for the observance by said sub-contractor of the terms of this Agreement.

"A sub-contractor is defined as any person, other than an employee covered by this Agreement, firm or corporation who agrees, orally or in writing, to perform for or on behalf of an individual employer any part or portion of the work covered by this Agreement."

A and Union C, including; inter alia, the requirement that B's employees must become and remain members of Union C.

Thus discriminatory conditions of employment are imposed by A and C upon employees of B, the subcontractor; namely, working conditions established by an employer not their own and by a union not of their own choosing.

Under the facts of the instant case, A represents the AGC Chapters, C represents the Operating Engineers Union, and B represents the small engineering firm of St. Maurice, Helmkamp and Musser, the Petitioner herein, who was the charging party before the Board. Moreover, the employees of Petitioner, the subcontractor, are members of Engineers and Scientists of California, a labor organization certified by the Board as their exclusive bargaining representative in a secret ballot election in which the Operating Engineers Union had an opportunity to participate. Finally, Petitioner's employees are covered by a collective bargaining agreement between their Union and Western Association of Engineers & Land Surveyors, to which Petitioner belongs.

In the instant case, therefore, not only does the "subcontractor" clause create *inherently discriminatory* conditions of the employment but its *implementation necessitates violations* of the Act by Petitioner; namely, unlawfully refusing to bargain with the statutory representative of his employees, interfering with the rights of his employees to be represented by a union of their own choosing, and discriminating against his employees because of their non-membership in Operating Engineers

Union. In short, Petitioner cannot comply with the "subcontractor" clause without violating the law.

Thus, the *basic question presented for review*, expressed in the terms and the circumstances of the case, as required by Rule 23(1)(c), is whether the "subcontractor" clause violates *any* of the sections of the Act charged, where:

(a) it seeks to include employees outside the bargaining unit covered by the contract;

(b) it applies to employees not employed by any of the employer-parties to said contract;

(c) it applies to employees not represented by the union-party to said contract;

(d) it applies to employees who are employed by an employer who is a party to a different collective bargaining agreement with a different union;

(e) it applies to employees who are members of and represented by another union which is certified by the National Labor Relations Board as exclusive bargaining representative of such employees;

(f) it requires employees to become members of a union which does not represent them;

(g) it requires employers to violate the Act in dealing with their employees.

In effect, the "subcontractor" clause is a device utilized by the Operating Engineers Union for seizing control over employees whom it is unable to organize. Viewed realistically, the situation is that of a union doing indirectly

what it cannot lawfully accomplish directly. Since Operating Engineers Union is not the bargaining representative of petitioner's employees and has no standing to negotiate an agreement with petitioner concerning their working conditions, it has resorted to an agreement with another employer, AGC, to gain dominion over petitioner's employees. But how can one employer *lawfully* grant to a union bargaining rights over the employees of some other employer?

Both the Board and the Court below held that a strike to enforce the "subcontractor" clause was unlawful, but that its "execution, maintenance and implementation" were not unlawful. Out of this paradox or dilemma arise the following questions which are presented for review herein:

1. Whether, as a matter of law, the execution, maintenance and implementation of a collective bargaining agreement by virtue of which an employer is precluded from subcontracting work to another employer unless the latter applies the terms and conditions of such agreement to his own employees constitutes unlawful *interference, restraint and coercion* by an employer under §8(a)(1) of the Labor Management Relations Act 1949 as amended, 29 USC §158, where the subcontractor's employees are represented by another labor organization which has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

2. Whether, as a matter of law, such "subcontractor" clause under the aforesaid circumstances constitutes unlawful *assistance* by an employer to a labor organization in violation of §8(a)(2) of said Act.

3. Whether, as a matter of law, such "subcontractor" clause under the aforesaid circumstances constitutes unlawful *discrimination* by an employer against employees in violation of §8(a)(3) of said Act.

4. Whether, as a matter of law, such "subcontractor" clause under the aforesaid circumstances constitutes unlawful *restraint and coercion* by a labor organization of the rights guaranteed employees in violation of §8(b)(1)(A) of the Act.

5. Whether, as a matter of law, such "subcontractor" clause under the aforesaid circumstances constitutes an unlawful *attempt by a labor organization to cause an employer to discriminate* against employees in violation of §8(b)(2) of the Act.

6. Whether, as a matter of law, *mere execution* of said collective bargaining agreement constitutes a violation of any of the sections charged herein where the employees whose rights will be adversely affected are prospective and identifiable.

7. Whether, as a matter of law, *maintenance and implementation* of said collective bargaining agreement constitutes a violation of any of the sections of said Act charged herein where the employees whose rights will be adversely affected are prospective and identifiable.

8. Whether, as a matter of law, any of the sections of said Act charged herein prohibit an employer and a labor organization from entering into a collective bargaining agreement *intended to be applicable to employees who are not represented by said labor organization*, who are not employees of said employer, and who are not included within the bargaining unit covered by said agreement.

9. Whether, as a matter of law, any of the sections of said Act charged herein prohibit an employer and a labor organization from entering into a collective bargaining agreement intended to establish the terms and conditions of employment for employees *who are covered by a separate collective bargaining agreement* between another labor organization where the latter labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of said employees.

10. Whether, as a matter of law, any of the sections of said Act charged herein prohibit an employer and a labor organization from entering into a collective bargaining agreement requiring the employees of *other* employers to become and remain members of said labor organization where a different labor organization has been certified by the Board as the exclusive bargaining representative of said employees, and where said employees are lawfully required to become and remain members of the certified labor organization pursuant to a collective bargaining agreement between their employers and said certified labor organization.

11. Whether, as a matter of law, execution, maintenance and implementation of said agreement constitutes discrimination *by one employer against other employers*, or discrimination by an employer against employees within the meaning of §8(a)(3) of said Act.

12. Whether, as a matter of law, discrimination against employees by an employer may constitute a violation of §8(a)(3) of said Act where such employees are identifiable prospective employees of identifiable prospective employers as distinguished from existing, identified employees of existing, identified employers.

13. Whether, as a matter of law, the National Labor Relations Board or the Court of Appeals upon review may dismiss a complaint on the grounds that the unfair labor practices alleged therein are too remote and too speculative in the absence of any evidence in the record to support such finding of fact or conclusion of law.

14. Whether, as a matter of law, the finding of fact or the conclusion of law made by the National Labor Relations Board (and affirmed by the Court of Appeals upon review) that the unfair labor practices alleged in the complaint are too remote and too speculative is contrary to the evidence.

15. Whether, as a matter of law, the National Labor Relations Board, or the Court of Appeals upon review, may properly dismiss a complaint alleging unfair labor practices by considering and determining only the issue raised by one allegation of the complaint and *failing to consider all other allegations of the complaint.*

16. Whether, as a matter of law, the United States Court of Appeals may properly exercise judicial review of a decision by the National Labor Relations Board by *deferring to the expertise of the Board in a case where there is no majority opinion among the Board members as to the grounds for the decision.*

STATUTORY PROVISIONS INVOLVED.

The statute involved is the National Labor Relations Act, as amended (61 Stat. 136, 29 USC 151 et seq.) popularly known as the "Taft-Hartley Act". The following

sections or subsections of said Act are material and relevant to this case, and the full text of said sections or subsections is printed in Appendix "B" hereto:

Section 2(2);
Section 2(3);
Section 2(9);
Section 7;
Section 8(a)(1);
Section 8(a)(2);
Section 8(a)(3);
Section 8(a)(5);
Section 8(b)(1)(A);
Section 8(b)(2);
Section 8(b)(3);
Section 9(a);
Section 13.

STATEMENT OF THE CASE.

Petitioner is a small firm with its principal office in Marysville, California. It is engaged in office and field engineering work. The office work consists of making drawings for earth-moving, grading, filling and the like together with all the engineering calculations involved. The field work consists of laying out these drawings and plans on the job site of construction projects and the supervision of such work. The field work does not involve the operation of any earth-moving equipment such as caterpillar tractors, steam shovels and the like. Such work is performed by general contractors who are members of AGC and whose employees are represented by Operating Engineers Union.

The employees of Petitioner together with the employees of other engineering firms in Northern California are represented by an independent labor organization, Engineers and Scientists of California, which received National Labor Relations Board certification as the result of a secret ballot election in 1952. This independent union has a collective bargaining agreement with Western Association of Engineers and Land Surveyors, Inc., of which Petitioner is an employer-member. All members of this Association are registered or licensed civil engineers or land surveyors under the Business and Professions Code of the State of California.

In March 1955, a Joint Venture composed of four general contractors, all members of AGC, subcontracted certain field survey work at Travis Air Force Base, California, to Petitioner. Operating Engineers Union claimed a violation of the "subcontractor" clause in its collective bargaining agreement with AGC and struck the Travis Air Base construction project. Petitioner filed "secondary boycott" charges under Section 8(b)(4)(A) of the Act and the Operating Engineers Union entered into a formal settlement with the Board providing for entry of a consent decree by the Court of Appeals for the Ninth Circuit enjoining such strike action. In the interim, however, the Joint Venture was forced to capitulate to the Union and removed Petitioner's employees from the job.

Both the Board and the Court below (in No. 14298 and No. 14406) found that by the foregoing conduct the AGC and the Operating Engineers Union violated all of the sections of the Act charged herein: namely, §8(a)(1),(2) and (3), and §8(b)(1)(A) and (2).

In order to escape liability under the Act for strike action the Union in June 1955 demanded a new "subcontractor" clause from AGC which required all subcontractors to agree, in writing, in advance to comply with the AGC Master Agreement, including another new provision, namely, a "union shop" clause requiring the subcontractor's employees to become and remain members of Operating Engineers Union. The AGC acceded to these demands, although expressing doubt as to their legality, because of strike pressure from the Union.

Thus, the Union, instead of having to enforce the "subcontractor" clause *retrospectively* by forcing the removal of the subcontractor's employees from a job *after* the subcontractor started work, was in a position to implement the "subcontractor" clause *prospectively* by preventing any subcontractor from commencing work unless he agreed in advance to comply with its Master Agreement with AGC.

That this was the Union's object, and that it was directed against Petitioner, was immediately demonstrated. In July 1955, H. Earl Parker, a general contractor and AGC member, refused to award a subcontract to Petitioner unless Petitioner agreed to comply with the AGC Operating Engineers Union Master Agreement even though Petitioner informed Parker that it could not lawfully do so.

Parker's position is very revealing. In requesting advice from the AGC, Parker stated:

> "We have received from St. Maurice, Helmkamp & Musser (petitioner) . . . a quotation to do this work, *and would very much like to award same to them.* In

the past, we have hired them to do work of like nature, but have been continually harassed and even threatened with actual work stoppage by Engineers Local No. 3 . . . if we did not withdraw them from the job." (Emphasis supplied.)

The AGC instructed Parker *not* to subcontract work to Petitioner unless Petitioner agreed "in writing . . . (to) observe and abide by all of the terms and conditions of said Master Agreement . . ."

In fact, the stipulated evidence shows that *but for the existence and maintenance* of the "subcontractor" clause in the Master Agreement and the advice given by AGC to *implement it,* Parker would have subcontracted over $100,000.00 of work to Petitioner on construction jobs worth almost six and one-half million dollars.

This summarizes the factual situation and the legal issues raised.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The jurisdiction of the Court of Appeals was invoked and asserted under Section 10(f) of the Labor Management Relations Act, 29 USCA 160(f).

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the District of Columbia Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court.

3. The decision of the Court of Appeals for the District of Columbia Circuit is in conflict with applicable decisions of other Courts of Appeals.

4. The instant case involves substantial questions of public policy.

5. The instant case calls for an exercise of this Court's power of supervision over the Courts of Appeals in reviewing decisions of the National Labor Relations Board.

ARGUMENT.

1. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This is a case of first impression. The legality of this type of "subcontractor" clause has not been previously litigated. The conclusions and recommendations of the Trial Examiner for the National Labor Relations Board were set aside by a *divided* Board. Although the decision of the Court of Appeals was unanimous, the opinion plainly indicates that the Court *accepted separate* but *conflicting* and *virtually contradictory* opinions of the various Board members *as constituting an expression of administrative expertise.*

The issue in this case raises basic questions as to the scope of the Labor Management Relations Act. Over the years numerous decisions of the Board and the Courts, including the opinions of this Court, have created a large

body of labor law elucidating the various rights and duties of employers, employees and labor organizations under this federal statute. However, many fundamental problems and basic principles have not as yet been fully explored or settled. The questions presented for review indicate the fundamental nature and importance of the issue involved in this case.

For example, does the "subcontractor" clause constitute discrimination against *employers* or discrimination against *employees?* Does the Act protect *employees* from discrimination by one employer against another employer where such discrimination is based *solely* upon the union affiliation of the latter employer's employees? To what extent does the Act protect *employees* against interference, restraint and coercion resulting from the execution, maintenance or implementation of collective bargaining agreements?

In addition, this case raises a question as to the relation between Sections 13 and 8(b) of the Act. Section 13 protects the right of a labor organization to strike *except* as prohibited by Section 8(b). Clearly, if the "subcontractor" clause itself is unlawful under Section 8(b), a strike to enforce it is equally illegal under Section 8(b). But both the Board and the Court below held that the "subcontractor" clause is not unlawful but that a strike to enforce it is unlawful.[2] This anomalous result does not

[2]The decision of this Court in the "hot cargo" case, *Carpenters v. NLRB*, 357 US 93, holding that strike action may be illegal, even though the contract sought to be enforced is not illegal per se, deals only with subsection 8(b)(4)(A), the so-called "secondary boycott" section, which is not involved in the instant case. The Board itself so held in *Local 911, Teamsters Union*, 122 NLRB No. 39, 43 LRRM 1144.

flow from the facts of the case but solely from an erroneous legal analysis and misapplication of legal principles.

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2. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The findings, conclusions and recommendations of the Trial Examiner were based in part squarely upon the decision of this Court in *Radio Officers Union v. NLRB*, 347 US 17; 33 LRRM 2417. The *result reached by three members* of the Board (in separate and distinct opinions), affirmed by the Court of Appeals, is in *direct conflict* with the aforesaid case. The legal theory upon which the General Counsel of the Board issued a complaint and prosecuted this case is directly based upon this Court's opinion in the *Radio Officers* case. The applicable principle is that the test of whether alleged conduct violates the Act is not only whether the conduct itself violates the Act but whether the *natural and foreseeable consequences* also violate the Act.

In the *Radio Officers* case this Court declared:

> "But it is also clear that *specific evidence of intent* to encourage or discourage is not an indispensable element of proof of violation of Section 8(a)(3) . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement . . . This recognition that specific proof of intent is unnecessary where employer *conduct inherently encourages or discourages union membership* is but an application of the common law rule that a man is held to intend the foreseeable consequences

of his conduct . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established." (347 US at 44-45.) (Emphasis supplied.)

* * * * *

". . . subjective evidence of employee response was not contemplated by the drafters (of Sec. 8(a)(3)) . . . (and) such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination." (at p. 51.)

* * * * *

"But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for the purposes of violation of Section 8(a)(3). Nor does the Act require that this change in employees' 'quantum of desire' to join a union have immediate manifestations.

"Obviously, it would be a gross inconsistency to hold that an inherent effect of certain discrimination is encouragement of union membership but that the Board may not reasonably infer such encouragement. We have held that a natural result of the disparate wage treatment in *Gaynor* was encouragement of union membership; thus it would be unreasonable to draw any inference other than that encouragement would result from such action." (at p. 51.)

* * * * *

". . . Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of the union, those employers must be presumed to have intended such encouragement." (at p. 52.)

Application of principles to case at bar.

The "subcontractor" clause in the instant case is clearly within the context of the foregoing principles for the reason that it "inherently" encourages membership in Operating Engineers Union and discourages membership in any other union.

In the *Radio Officers* case this Court further declared:

"The policy of the Act is to insulate employees' jobs from their organizational rights. Thus Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join union, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood. *The only limitation Congress has chosen to impose on this right is specified in the proviso* to Section 8(a)(3) *which authorizes employers to enter into certain union security contracts. . . .*" (at p. 40.) (Emphasis supplied.)

* * * * *

"*No other discrimination aimed at encouraging employees to join, retain, or stay in good standing in a union is condoned.*" (at p. 42.) (Emphasis supplied.)

It follows, therefore, that Section 8(a)(3) prohibits an agreement between an employer and a union that requires employees of another employer to become members of the contracting union. The proviso to Section 8(a)(3) and the decision of this Court in the *Radio Officers* case (supra)

do not permit a union to make a union security agreement with one employer to be applicable to the employees of another employer. But that is precisely the object and intent of the "subcontractor" clause in the instant case. Thus, the "subcontractor" clause in conjunction with the "union shop" clause must be regarded as *inherently unlawful* under the principles already enunciated by this Court.

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3. THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE INSTANT CASE IS IN CONFLICT WITH APPLICABLE DECISIONS OF OTHER COURTS OF APPEALS.

(a) Numerous decisions by other Courts of Appeals have held that the test of whether alleged unlawful conduct constitutes interference, restraint and coercion of employees proscribed by the Act *is the reasonable tendency of the acts and not their actual effect. NLRB v. Ford Bros.*, 170 F. 2d 735 (7th Cir.), 23 LRRM 2088; *NLRB v. Illinois Tool Works*, 153 F. 2d 811 (7th Cir.), 17 LRRM 841; *NLRB v. Aintree Corp.*, 132 F. 2d 469 (7th Cir.), 11 LRRM 646, cert. den. 318 U.S. 744, 12 LRRM 890; *Swift & Co.*, 129 F. 2d 22 (8th Cir.), 10 LRRM 837; *Capital Service Inc. v. NLRB*, 204 F. 2d 848 (9th Cir.), 32 LRRM 2280; *NLRB v. Collins Baking Co.*, 193 F. 2d 483 (5th Cir.), 29 LRRM 2206; *NLRB v. Essex Wire Corp.*, 245 F. 2d 39 (9th Cir.), 39 LRRM 2632; *NLRB v. Talladega Cotton Factory*, 213 F. 2d 209 (5th Cir.), 34 LRRM 2196; *NLRB v. Vail Mfg. Co.*, 158 F. 2d 664 (7th Cir.), 19 LRRM 2177, cert. den. 331 U.S. 835; *Plumbers and Steamfitters Local 234*, 231 F. 2d 447 (5th Cir.), 37 LRRM 2837.

This test has clear application in the instant case because the thrust of the "subcontractor" clause, even without regard to the "union shop" clause, is to establish terms and conditions of employment for employees whom Operating Engineers Union has no authority to represent and who are not properly within the reach of the bargaining unit covered by the AGC-Operating Engineers Master Agreement. Since the evidence shows that prospective implementation of the "subcontractor" clause is tantamount to the *exclusion of Petitioner's employees from performing field survey work at more than 90 per cent of the projects undertaken by general contractors in two-thirds of the State of California,* the natural and inevitable tendency to interfere with, restrain and coerce employees in the free exercise of the right guaranteed them by Section 7 of the Act *is the only legal conclusion permissible.*

(b) Numerous decisions of other Courts of Appeals have held that *mere execution* of a collective bargaining agreement which contains union security or union recognition provisions in excess of the scope permitted by the Act constitute a violation of the statute entirely apart from its enforcement and without any necessity of showing actual knowledge by, or effort upon any employer. *Red Star Express Lines v. NLRB,* 196 F. 2d 78 at 81 (2d Cir.), 29 LRRM 2705; *NLRB v. Gaynor News Co.,* 197 F. 2d 710 (2d Cir.), 30 LRRM 2340, affirmed 347 U.S. 17; *Acme Mattress Co.,* 192 F. 2d 425 (7th Cir.), 29 LRRM 2079; *NLRB v. New York Employers Association, Inc.,* 196 F. 2d 78 (2d Cir.), 29 LRRM 2705; *Eichleay Corp.,* 206 F. 2d 799 (3d Cir.), 32 LRRM 2628; *Ronney & Sons*

Furniture, 206 F. 2d 730 (9th Cir.), 32 LRRM 2635, cert. den. 346 U.S. 937; *F. H. McGraw*, 206 F. 2d 635 (6th Cir.), 32 LRRM 2220; *Operating Engineers, Local 57*, 201 F. 2d 771 (1st Cir.), 31 LRRM 2344; *Thomas Rigging Co.*, 211 F. 2d 153 (9th Cir.), 33 LRRM 2653.

In the *New York Employers Association* case the Court of Appeals for the Second Circuit stated:

> "The execution of a contract containing a forbidden union security clause constitutes an unfair labor practice. This is so because the *existence* of such an agreement *without more* tends to encourage membership in a labor organization . . . The Act requires that the employee shall have freedom of choice and any form of interference with that choice is forbidden." (Emphasis supplied.)

This principle is followed and applied almost daily by the Board in setting aside collective bargaining agreements containing illegal provisions such as closed-shop clauses, union-shop clauses which fail to grant the required thirty-days grace period, hiring-hall clauses which require union clearance or which fail to provide safeguards against discriminatory operation, prehire recognition contracts and union security contracts with minority unions, etc.

In none of these cases is it legally necessary to show that the employer enforced the contract because of economic pressure from the union. The important point as applied to this case is that under the Act the legality or illegality of a collective bargaining agreement does not depend upon whether it was entered into voluntarily or involuntarily.

Thus, the conclusion by the court below that "implementation" of the "subcontractor" clause by the AGC *was voluntary*, and, therefore, no violation could exist, is in conflict with a well-established principle, enforced by many Courts of Appeals, and is clearly erroneous.

(c) numerous decisions by other Courts of Appeals have held that Section 8(a)(3) is not limited to an employer's own employees and is not limited to *particular, identified, existing employees. West Texas Utilities*, (5th Cir.) 218 F. 2d 824, 35 LRRM 2531, cert. den. 349 U.S. 953, 36 LRRM 2203; *E. F. Shuck Construction Co.*, (9th Cir.) 243 F. 2d 519, 39 LRRM 2322, 40 LRRM 2167; *Geo. D. Auchter*, (5th Cir.) 209 F. 2d 273, 33 LRRM 2386; *American Newspaper Publishers Assn.*, (7th Cir.) 193 F. 2d 782, 29 LRRM 2230, aff. 345 U.S. 100; *National Maritime Union*, (2d Cir.) 175 F. 2d 686, 24 LRRM 2268; *Waterfront Employers of Washington*, 211 F. 2d 946, (9th Cir.) 34 LRRM 2049; *Boilermakers Local 803*, 218 F. 2d 299 (3rd Cir.), 35 LRRM 2355; *Daniel Hamm Drayage Co.*, 185 F. 2d 1020 (5th Cir.) 27 LRRM 2273.

Thus, the decision of the court below that the Act does not reach "prospective employees of a prospective subcontractor" is clearly contrary to the weight of judicial authority.

For example, in the *National Maritime Union* case (supra) the Court of Appeals for the Second Circuit held:

> ". . . we see no rational basis for respondents' argument that Section 8 (b) (2) does not make it an 'unfair labor practice' to attempt to cause an employer to discriminate against a group of employees or potential employees but only against some specified employees or potential employees."

As previously pointed out, the employees whose rights are adversely affected by the "subcontractor" clause are clearly identified or identifiable.

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4. THE INSTANT CASE INVOLVES SUBSTANTIAL QUESTIONS OF PUBLIC POLICY.

As already mentioned, the issue in this case presents fundamental questions of legislative intent as to the scope and meaning of basic provisions of an important federal statute. It is clear that Congress intended to outlaw collective bargaining agreements *which interfere with the rights of employees guaranteed under Section 7 of the Act*.

To hold, as did the Court below, that a labor organization which does not represent the employees of particular employers and an employer who does not employ such employees may by contract impose a bargaining representative not of their own choosing upon those employees and the terms and conditions of their employment with another employer is contrary to the basic objectives of the Act. Section 7 guarantees employees the right to bargain collectively through representatives of their own choosing. Section 8(a)(1), (2) and (3) prohibit an employer from foisting upon employees a bargaining representative not of their own choosing. Section 8(b)(1)(A) and (2) prohibit a labor organization from causing or attempting to cause him to do so, either by economic pressure or by contract provision. The inherent vice of the "subcontractor" clause is that it *creates conditions* for future wholesale discrimination. The record in this case

(agreed to by stipulation among all parties) establishes that such conclusion is not remote or speculative but rather is the natural, probable and foreseeable, if not the necessary and inevitable, consequence of this particular collective bargaining agreement in this particular fact situation.

Public policy certainly demands that employees represented by Engineers and Scientists of California be protected by the certification of the National Labor Relations Board that said independent union is their *exclusive* bargaining representative. This Court should consider the question of whether Operating Engineers Union by contract with AGC may lawfully ignore and evade that certification.

Public policy also demands that employees' job opportunities be protected against conditions imposed upon their employer which require him to violate the Act. This is precisely the effect of the "subcontractor" clause as applied to Petitioner and other employer-members of Western Association who are legally obligated to recognize Engineers and Scientists Union as the statutory representative of their employees. The certification of the independent union precludes recognition of Operating Engineers Union, and the agreement between Operating Engineers Union and AGC requiring such recognition should be held illegal per se as contrary to public policy.

Finally, it may be noted that this case involves a special type of "subcontractor" clause. It is not the usual clause designed to prevent an employer from evading his union contract or minimizing or defeating a union's gains by subcontracting out the work involved at cheaper terms.

In the case of the building and construction industry subcontracting is characteristic of the enterprise. It is impossible for a general contractor to specialize in all kinds of work or to have the crews or equipment to perform it. Consequently, he necessarily must contract out a large amount of each contract he performs. Such was the situation here. The parties themselves stipulated as follows:

> "This long-established practice of subcontracting is a fundamental characteristic of the building and construction industry, and its continuance is essential to the efficient and economical performance of building and construction work."
>
> • • •
>
> "It would be uneconomical, if not impossible, for a general engineering contractor or a general building contractor to assemble and maintain the specialized equipment and the specialized personnel needed to perform every phase of each one of the varied projects he is licensed to construct."

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5. THE INSTANT CASE CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION OVER THE COURTS OF APPEALS IN REVIEWING DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD.

In *Universal Camera v. NLRB*, 340 U.S. 474, 95 L. ed. 456, this Court laid down the basic rules concerning the scope of judicial review of decisions of the National Labor Relations Board. It is respectfully submitted that the decision of the Court of Appeals in this case has departed from the standards established in the aforesaid case.

In effect, the Court below has applied the principle of administrative agency "expertise" to a case which does not involve issues of fact requiring special knowledge to resolve, and which expresses *three directly conflicting views of the law with no majority opinion.*

(a) **Reasoning of the Board.**

The three majority members of the Board arrived at their decision by opposite lines of reasoning. Two of the members declared that if their process of reasoning was correct, the reasoning of the third member *could not* be correct. In other words, the reasoning of the majority was based upon two mutually exclusive and irreconcilable lines of thought. The Court below, instead of resolving this hopeless and irreconcilable conflict, contented itself by *refusing to interfere with either line of reasoning.* While recognizing that the Courts must defer to the Board's expertise in a proper case, it is submitted that, when the Board itself is hopelessly in conflict and cannot agree upon a single line of reasoning to decide a case, it is the duty and function of the Court to *assume jurisdiction and to issue an authoritative ruling.*

Chairman Leedom and Member Murdock decided that the acts here involved were not a discrimination against employees but constituted merely discrimination by one employer against another. The fallacy of this reasoning is so obvious that it is difficult to see why the Court below refrained from so declaring. The continued granting of subcontracts to Petitioner was conditioned not on something that Petitioner was required to do or not to do but was based solely and exclusively on a requirement of something that his *employees* had to do. In other words,

the *employees* had to change from the union of their own choice and the contract they had negotiated to Operating Engineers Union and the terms and conditions of its contract with AGC if they wanted to work under any subcontracts with members of AGC. Thus the object or target of the discrimination was not the employer but was *his employees.*

The third Board Member, whose vote made up the majority of the Board, disagreed with this reasoning and concluded that the discrimination was directed not against the employer but against his employees. However, Member Bean reasoned that the possible future effect upon employees of subcontractors was *too remote* and *too speculative* to constitute a violation of the Act.

It is submitted that such conclusion is contrary to the record in this case. When the Operating Engineers Union found that it was in violation of law by causing a work stoppage in order to enforce its demand, it resorted to the "subcontractor" clause involved in this case to accomplish exactly the same objective, namely, discrimination against exactly the same employees. The record shows that this new agreement between Operating Engineers Union and the AGC was signed on the *same day* upon which the Union signed its stipulation for a consent decree agreeing to discontinue the activities which have been found to be illegal in the companion cases Nos. 14,298 and 14,406.

The contract was entered into for the specific purpose of accomplishing exactly what the Board and the Court had prohibited in the two cases last mentioned. In other words, the Union said, "Instead of *removing* Petitioner's

employees from the job, we will *prevent them* from ever going on the job by means of this new form of 'subcontractor' clause."

Member Bean decided that execution, maintenance *and implementation* of the "subcontractor" clause was too remote and too speculative to constitute a violation of the Act. However, we believe it fair to say that the "subcontractor" clause was "*implemented*" at the time when Parker offered Petitioner work upon condition that Petitioner agree in advance to require his employees to become members of, and to work under the contract between Operating Engineers Union and the AGC. Certainly there was nothing remote and speculative about this. The subcontractor was identified and his employees were identified, and it was made very clear what the employees were required to do in order for the subcontractor to obtain the work in question.

Chairman Leedom and Member Murdock strongly criticized Member Bean's line of reasoning, saying:

> "The apparent ground for the distinction is that the Joint Venture lawfully could agree to refuse to do business prospectively with subcontractors who would not abide by its contract with the union, but that, having engaged in such a subcontract it could not thereafter suspend the subcontractor to rectify its breach of contract. We do not believe that this distinction is a valid one."

Yet the Court below, in effect, approved *both* these contradictory lines of reasoning.

(b) Reasoning of the Court of Appeals.

1. At the outset Petitioner respectfully submits that the Court of Appeals failed to consider at least two-thirds of the case presented to it for review. This case was considered only in the final two paragraphs of the Court's nine page opinion. The sole issue which the Court ruled on was whether the "subcontractor" clause constitutes unlawful discrimination in violation of Sections 8(a)(3) and 8(b)(2). The Court did not rule upon these additional points which Petitioner raised before the Board and specifically set forth in its petition for review and brief to the Court of Appeals:

Whether the "subcontractor" clause constitutes *interference, restraint and coercion* of employees' rights in violation of Section 8(a)(1)?

Whether the "subcontractor" clause constitutes unlawful *assistance* to a labor organization in violation of Section 8(a)(2)?

Whether the "subcontractor" clause constitutes *restraint and coercion* of employees' rights in violation of Section 8(b)(1)(A)?

Whether the "subcontractor" clause constitutes an attempt by a labor organization to cause subcontractors to discriminate against their employees in violation of Section 8(b)(2)?

It is Petitioner's position that the "subcontractor" clause may and should be found to constitute illegal interference, restraint, coercion or assistance, or an unlawful *attempt* to cause discrimination independent of whether or not it is found to constitute actual discrimination.

2. The crux of the Court's opinion is its *deference to the expertise of the Board*. The fallacy of such approach has been mentioned above. Such approach is inconsistent with this Court's reasoning in the *Universal Camera* case, cited supra, wherein it is declared that the Courts of Appeals must set aside the findings of the Board "when the record . . . clearly precludes the Board's decision from being justified by . . . its informed judgment on matters within its special competence. . . ." (340 U.S. at 490.)

It cannot be overemphasized that the facts in this case are not in dispute. All of the evidence was submitted by stipulations among the parties. The findings of the Trial Examiner completely support the conclusion that the "subcontractor" clause is unlawful per se. The Court below did not give any consideration to the findings of the Trial Examiner, although this Court declared in *Universal Camera*, supra, that:

> ". . . an examiner's report is as much a part of the record as the complaint or the testimony. According to the Administrative Procedure Act, 'All decisions (including initial, recommended, or tentative decision) shall become a part of the record . . .' • • •
>
> ". . . the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report." (340 U.S. at 493.)

It is submitted that the findings of the Trial Examiner, based upon undisputed evidence, do not permit the Court to conclude that the "relationships between AGC and prospective employees of a prospective subcontractor were so attenuated" that "execution, maintenance and imple-

mentation of the "subcontractor" clause cannot constitute a violation of any section of the Act.

Moreover, the *Court's statement that the Board so concluded* is erroneous. As previously pointed out, only *one* Board member took the position that the "possible effect" of the subcontractor clause was "too remote" and "too speculative" to support a finding of a violation of the Act. Petitioner respectfully urges that the Court of Appeals has no power to fashion a majority *opinion* for the Board where none exists, especially where Members Leedom and Murdock, who together with Member Bean comprise the majority decision from which Petitioner appealed, flatly and *expressly* repudiated that very position taken by Member Bean.

The irreconcilable divergence of view in the opinion of the Board Members cannot be overemphasized:

Two Members, Rodgers and Jenkins, held that the "subcontractor" clause was illegal per se, accepting the findings and conclusions of the Trial Examiner and relying primarily, as did the Examiner, on the opinion and reasoning of this Court in the *Radio Officers* case, supra.

Two Members, Leedom and Murdock dismissed all charges on the ground that the "subcontractor" clause discriminates only against employers, and that the Act only forbids discrimination against employees.

Member Bean held that the strike to enforce the "subcontractor" clause was illegal but that its execution, maintenance and prospective implementation was not illegal because, as explained above, its "merely possible effect" was "too remote" and "too speculative".

For the Court of Appeals to accept, without any independent review whatever, the "judgment" of the Board in this case *clearly calls for the supervisory intervention of this Court*. Petitioner submits that this is that rare case where the standard enunciated in the *Universal Camera* case has been "grossly misapplied". (340 U.S. at 491.) To the extent that the decision of the Court of Appeals is based upon a finding of an "attenuated" relationship, it is not supported by *any* evidence and is contrary to all of the evidence. To the extent that it is based upon a finding that the *only* discrimination foreseeably resulting from the execution, maintenance and implementation of the "subcontractor" clause is discrimination *against employers* rather than employees, it is likewise not supported by any evidence and is *contrary to all of the evidence*.

(c) Alleged administrative expertise in conflict with other decisions of same agency.

Lastly, the Court of Appeals' deference to the Board's alleged "expertise" must be regarded as erroneous where the conclusion reached by the Board in the instant case is completely out of line with its own decisions.

This point can best be made by referring to the latest Board decision on the subject of illegal hiring hall agreements between employers and unions. In *Operating Engineers Union Local 138* (Nassau and Suffolk Contractors' Assn.), 123 NLRB No. 167, 44 LRRM 1138, the Board has held that where a collective bargaining agreement provides for an exclusive union hiring hall but fails expressly and affirmatively to state that it shall be operated in a

non-discriminatory manner, the parties must jointly refund all monies paid by employees to the union over a six-months period *because the existence of such contract without regard to its enforcement or evidence of actual discrimination, is inherently coercive and unlawful.*

This legal theory of the Board, based upon the *Mountain Pacific* decision, 119 NLRB 883, 41 LRRM 1460, cannot be reconciled with its decision in the instant case. Significantly, the *Mountain Pacific* doctrine makes a collective bargaining agreement illegal *per se* even though it is non-discriminatory on its face and *without regard to its actual impact on any employees.*

Petitioner submits that if an exclusive hiring hall clause violates the Act because it is inherently coercive, *a fortiori*, the "subcontractor" clause in the instant case must be held violative of the Act for the same reason.

CONCLUSION.

By way of final comment, Petitioner points out that the "subcontractor" clause challenged herein threatens the basic freedoms of our society. Big Business and Big Labor have put their respective powers together to control a substantial industry by saying, in effect, to the small employers *and their employees:* "We have decided upon the rules under which you can do business. If you want to do any work in this industry in this area, you will have to follow our rules."

For all of the reasons discussed herein, and because of the importance of this case in the administration of the

federal labor law, it is respectfully urged that this petition for issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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Attorneys for Petitioner.

(Appendices Follow.)

Appendix "A"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14298

OPERATING ENGINEERS LOCAL UNION No. 3 of the INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 14406

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NORTHERN CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., and CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., RESPONDENTS

No. 14466

ST. MAURICE, HELMKAMP AND MUSSER, a California partnership, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions to Review and Set Aside in Part, and on Petition and Cross-Petition to Enforce, an Order of the National Labor Relations Board

Decided May 8, 1959

Mr. P. H. McCarthy, Jr., of the bar of the Supreme Court of California, *pro hac vice*, by special leave of

Court, with whom *Mr. J. Albert Woll* was on the brief for petitioner in No. 14298.

Mr. George Bahrs, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Mr. Raymond S. Smethurst* was on the brief, for petitioner in No. 14466.

Mr. Arnold Ordman, Attorney, National Labor Relations Board, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of Court, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board at the time the brief was filed, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, *Miss Rosanna A. Blake* and *Mrs. Nancy M. Sherman*, Attorneys, National Labor Relations Board, were on the brief, for petitioner in No. 14406 and respondent in Nos. 14298 and 14466.

Mr. Thomas E. Stanton, Jr., of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Mr. Travis Brown* was on the brief for respondents in No. 14,406.

Before WILBUR K. MILLER, BAZELON and FAHY, *Circuit Judges*.

FAHY, *Circuit Judge*: These three consolidated cases bring under review a decision and order of the National Labor Relations Board.[1] The relevant events appear in

[1] In No. 14298 petitioner, Local 3, seeks review of a decision and order which found that it and AGC had committed unfair labor practices. The Board seeks enforcement against Local 3. In No. 14406 the Board as petitioner seeks enforcement of that portion

considerable elaboration in the report of the case at 119 N.L.R.B. 1026 (1957).

The Associated General Contractors of America, Inc., referred to as AGC, was the prime contractor on a construction project at Travis Air Force Base in California. The Operating Engineers, Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO, referred to as Local 3, represented the AGC employees under two collective bargaining agreements with AGC, one referred to as the 1954 Agreement and the other as the 1955 Agreement.

Case No. 14298 involves the 1954 Agreement, containing the following clause:

> The terms and conditions of this agreement . . . shall apply equally to any sub-contractor under the control of, or working under contract with [the] employer on any work covered by this agreement, and said sub-contractor with respect to such work shall be considered the same as an individual employer covered hereby.

AGC subcontracted some of the work to St. Maurice, Helmkamp and Musser, a California partnership, referred to as Musser. Musser is a member of the Western Association of Engineers, Architects and Surveyors, called Western Association, which represents its members in labor relations matters. In 1952 the San Francisco Area Group of Professional Employees, referred to as Professional Employees, was certified as the representative

of its order directed against AGC. Musser, petitioner in No. 14466, seeks to review and set aside that portion of the order which dismisses allegations in the complaint that Local 3 and AGC committed unfair labor practices other than those found by the Board.

of the employees working for members of the Western Association. Musser employed on the Travis project four members of Professional Employees who had a collective bargaining agreement with Musser, via Western Association.

At the instance of Local 3 a work stoppage occurred at the Travis project. The Board found it to be due to the employment by Musser of the four employees who would not come under Local 3's agreement with AGC. The Board also found that in the effort to bring them within the agreement pressure through the work stoppage was put upon AGC and, through AGC, upon Musser and the four employees. AGC in fact brought about the suspension of the four employees and replaced them with its own, who were covered by its collective bargaining agreement with Local 3. The Board found that in this manner (a) AGC violated sections 8 (a) (1) (2) and (3) of the Labor Management Relations Act and that Local 3 violated sections 8 (b) (1) (A) and (2) by causing the removal of Musser's employees and (b) that Local 3 also violated sections 8 (b) (1) (A) and (2) by attempting to cause Musser, through the AGC, to violate section 8 (a) (3).[2]

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[2]The pertinent provisions of the Act, 61 Stat. 140-41 (1947), 29 U.S.C. § 158 (1952), are:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to en-

In case No. 14466 the 1955 Agreement was in effect. The agreement contained a provision for union security and a subcontractor's clause which reads as follows:

> The terms and conditions of this Agreement insofar as it affects Employer and the individual employer shall apply equally to any sub-contractor under the control of, or working under contract with such employer on any work covered by this Agreement, and said sub-contractor with respect to such work shall be considered the same as an individual employer covered hereby.
>
> *That if an individual employer shall sub-contract work as herein defined, provision shall be made in such sub-contract for the observance by said sub-contractor of the terms of this Agreement.* [Emphasis supplied.]

Moreover, AGC this time refused to subcontract to Musser, because Musser would not conform with this provision. Musser's reason was, as previously, that it had a collective bargaining agreement with the Professional Employees as the certified representative of its employees, and, therefore, it could not lawfully compel them to join Local 3. In this instance the Board, by a divided vote as

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courage or discourage membership in any labor organization . . ."

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . ."

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

in the other case, held that AGC had not violated the Act, reasoning that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected.[3]

In case No. 14298 we see no reason to disturb the findings of the Board hinging upon the pressures exerted by the work stoppage, or the Board's judgment that the impact upon the four employees flowed naturally from the stoppage. Moreover, we find no reason to disagree with the legal conclusion of the Board that the specified violations occurred as a result. Accordingly the Board's request for enforcement of that portion of its order running against Local 3 will be granted. Case No. 14406 must necessarily stand or fall along with case No. 14298 because of the interrelationship of the activities carried on between Local 3 and AGC against Musser's employees. It follows from our conclusion to enforce the Board's order against Local 3 in No. 14298 that the Board's petition for enforcement of that portion of the order directed against AGC, the subject matter of case No. 14406, must also be granted.

AGC contends the Board should have recognized that when Musser's employees came onto the Travis job they came into a collective bargaining unit, by reason of the subcontractor's clause, covered by the 1954 Agreement of Local 3 with AGC, and were subject to its terms. In support of this contention it says that the conditions

[3] In both cases the actual terms of the orders of the Board are not challenged.

existing among building and construction contractors in the area, their employees, and the unions, required this in order to promote stability and industrial peace, the fundamental purposes of the Act. It may well be that the industrial and labor conditions in the locality warrant a new approach by the Board in formulating bargaining units in the building and construction industry there, and that the last word has not been said in an evolving situation. But be that as it may we take this case in its present posture. A bargaining unit which would release the Musser employees from the unit fixed for them by the Board had not been established. Local 3's bargaining agreement, moreover, was not with Musser; it was with AGC. When the latter failed to comply[4] it was within the competence of the Board to hold that Local 3, by striking against AGC, brought pressure to bear which carried through as discrimination against Musser's employees due to their membership in another labor organization, and that AGC, by succumbing to Local 3's pressure, discriminated against these same employees when it caused them to be suspended from the Travis project for not belonging to Local 3. No party to the proceedings contends that the

[4]Local 3 complained to AGC that certain sections of the 1954 Agreement relating to wage payments and payments into an employee pension fund were not being observed with respect to Musser's employees on the Travis project. Local 3 sought a "grievance procedure" and when no action was taken it notified AGC that it was "withdrawing" all employees represented by it on the project. Subsequently Local 3 and AGC established a Board of Adjustment to investigate Local 3's complaints. The Board ruled that AGC had to take the necessary means to insure that work on the project would be in compliance with the 1954 Agreement since it contained a provision that every subcontractor would abide by the terms and conditions of that agreement.

strike was protected by section 13 of the Act if it amounted to discrimination prohibited by section 8.

It is also contended that no unfair labor practice can be found where the discriminatory action is against employees other than those of the direct employer; specifically, that AGC could not be found to have violated section 8 (a) (3) by terminating the employment of Musser's employees, nor could Local 3 have been found to have violated section 8 (b) (2) by causing that action, since there was no direct employer-employee relationship between AGC and Musser's employees. This position had the support of two members of the Board, relying upon previous Board decisions, *The Great Atlantic and Pacific Tea Co.*, 116 N.L.R.B. 943 (1956); *United Association of Journeymen of the Plumbing and Pipefitting Industry*, 116 N.L.R.B. 119 (1956), and language in *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675. The provisions of the Act here involved, see footnote 2, *supra*, do not read as this contention would construe them, in contrast with language in other provisions.[5] The terms used in the applicable provision bear an interpretation which reaches discrimination as to employees of another employer. We must guard against giving this broad language a scope which includes employees whose relationship to the controversy is so attenuated as to cause their inclusion to defeat a sound administration of the Act;

[5] Section 8 (a) (5) states that the employer will commit an unfair labor practice if he refuses to bargain collectively with representatives of *his* employees, and section 8 (b) (4) (B) prohibits a labor organization from striking to force or require any other employer to recognize the labor organization "as the representative of *his* employees. . . ." (Emphasis supplied.) See, also, *Austin Company*, 101 N.L.R.B. 1257 (1952).

yet the closeness of Musser to the dispute leads us to defer to the Board's interpretation which brings its four employees within the questioned protection. This is an area of interpretation into which we should follow the Board. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 128-29; *NLRB v. Gluek Brewing Co.*, 144 F.2d 847, 855 (8th Cir. 1944).

This brings us to case No. 14466, where the 1955 Agreement governed the relations between AGC and Local 3. In compliance with the subcontractor clause, AGC, in contrast with its previous conduct, declined this time to subcontract to Musser except in accordance with the agreement with Local 3. The Board, again dividing, held that the actions of AGC and Local 3, in executing, maintaining, and implementing the 1955 Agreement, did not add up to violations by AGC of sections 8 (a) (1), (2) and (3) or by Local 3 of sections 8 (b) (1) (A) and (2). This is heavily attacked as inconsistent with the ruling under the 1954 Agreement; but there are factual differences, and we are constrained to support the decision of the Board that these permit a different legal conclusion. Here AGC abided by its agreement with Local 3. While the result might well have been that employees of Musser were denied employment on AGC projects due to their affiliation with a union other than Local 3, this did not come about as a result of strike action by Local 3, as found in the other case, or by pressure exerted through AGC, as also there found, but by a decision on the part of AGC itself to comply with its agreement with Local 3. Though, as the Board suggests in this Court, there was discrimination by one employer, AGC, against another, Musser, the

Act stands aside in respect of such action, forbidding discrimination only against employees.

We would not be well advised to substitute a judgment different from that of the Board. It could lawfully conclude, as it did, that the relationships between AGC and prospective employees of a prospective subcontractor were so attenuated that the refusal of AGC to award a subcontract to Musser, and the existence, maintenance and implementation of AGC's agreement with Local 3, did not constitute discrimination by either AGC or Local 3 against employees.

The order of the Board will be enforced.

Appendix "B"

STATUTORY PROVISIONS INVOLVED.

DEFINITIONS

SEC. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual

employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. *Provided*, That subject to

rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9(f), (g), and (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such mem-

bership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.